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No. 95-572

In the Supreme Court of the United States

OCTOBER TERM, 1995

M. REX LUFT AND JANICE LUFT, PETITIONERS

v.

FARMERS HOME ADMINISTRATION
AND CENTURY BANK STERLING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners have stated a cause of action under the Agricultural Credit Act of 1987.

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 10a-11a) and district court (Pet. App. 12a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was issued on April 26, 1995. A petition for rehearing was denied on June 14, 1995. Pet. App. 9a. The petition for a writ of certiorari was filed on September 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners owned a farm in Sterling, Colorado, which served as collateral for several loans from two banks. The Farm Credit Bank of Wichita (Farm Credit Bank)[1] held a first deed of trust on the farm, and Century Bank Sterling (Century Bank)[2] held a second deed of trust with a right of redemption. The Century Bank loans were guaranteed by the Farmers Home Administration (FmHA). Pet. 2. When petitioners defaulted on the first loan, Farm Credit Bank acquired the farm at a foreclosure sale. Century Bank then exercised its right of redemption and gave petitioners the opportunity to pay off their outstanding loans. Petitioners were unable to do so, however, and Century Bank began eviction proceedings as a prelude to sale of the farm. Pet. App. 13a.

Petitioners then filed the instant suit in state court against Century Bank and the FmHA, alleging negligence, breach of contract, fraud, and breach of the covenant of good faith and fair dealing. Petitioners' claims were based on their asserted right under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 100 Stat. 1568, to restructure the Century Bank loans. Pet. App. 12a-13a. Petitioners also alleged a "taking of property without due process of law in contravention of the Fifth Amendment." *Id.* at 14a. In addition to money damages, they sought to void the sale of their farm and to compel the FmHA to

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[1] The petition refers to this bank as the "Federal Land Bank of Wichita" (Pet. 2), while the district court order refers to it as the Farm Credit Bank (Pet. App. 13a).

[2] Century Bank is now known as Key Bank of Colorado.

offer them the opportunity to restructure their loans. *Id.* at 13a. The FmHA removed the action to federal district court. *Id.* at 12a.

2. Both the FmHA and Century Bank moved to dismiss. The district court granted the motions, concluding that, under *Griffin* v. *Federal Land Bank*, 902 F.2d 22 (10th Cir. 1990), petitioners had no private right of action to enforce the Agricultural Credit Act. Pet. App. 13a. The court also dismissed the takings claim pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 14a.

3. The court of appeals affirmed. Pet. App. 10a-11a. Relying on *Griffin* and on *Zajac* v. *Federal Land Bank*, 909 F.2d 1181 (8th Cir. 1990), the court held that there is no private right of action under the Agricultural Credit Act and that "[t]he exclusive remedy for a violation of the borrower's rights under the Act is administrative review." Pet. App. 11a.

ARGUMENT

Petitioners have no entitlement under the Agricultural Credit Act to restructure the FmHA-guaranteed loans obtained from Century Bank. Although two different provisions of the Act require that borrowers be given the opportunity in certain circumstances to restructure their loans, neither provision is applicable to the loans at issue here. The judgment of the court of appeals is therefore correct, and further review is not warranted.

1. a. Under one provision of the Agricultural Credit Act, which amended the Farm Credit Act of 1971, "qualified lender[s]" within the Farm Credit System (see 12 U.S.C. 2001, 2002) are prohibited from foreclosing on a "distressed loan before the lender has completed any pending consideration of the loan for

restructuring." 12 U.S.C. 2202a(b)(3); see 12 U.S.C. 2202a(a)(6) (defining "qualified lender"). For at least three reasons, that provision affords no help to petitioners here. First, Century Bank is not a part of the Farm Credit System,[3] and its loans were therefore not subject to the restructuring requirements of 12 U.S.C. 2202a(b)(3). Second, even with respect to loans that are subject to Section 2202a(b)(3)'s requirements, the courts of appeals have uniformly held, and petitioners concede (Pet. 3), that there is no private right of action in court. See *Grant* v. *Farm Credit Bank*, 8 F.3d 295, 296 (5th Cir. 1993); *Saltzman* v. *Farm Credit Servs. of Mid-America, ACA*, 950 F.2d 466, 469 (7th Cir. 1991); *Zajac* v. *Federal Land Bank*, 909 F.2d 1181, 1183 (8th Cir. 1990); *Griffin v. Federal Land Bank*, 902 F.2d 22, 24 (10th Cir. 1990); *Harper* v. *Federal Land Bank*, 878 F.2d 1172, 1177 (9th Cir. 1989), cert. denied, 493 U.S. 1057 (1990). The remedy for noncompliance by a farm credit bank lies instead with the administrative review process. *Zajac*, 909 F.2d at 1183. Finally, the FmHA has no administrative responsibility for the Farm Credit System, which is instead subject to regulation by the Farm Credit Administration. 12 U.S.C. 2002(a). Section

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[3] A financial institution that belongs to the Farm Credit System is readily identified by its name, which must include a statutory or regulatory designation or acronym, such as "Farm Credit Bank," "Production Credit Association," "PCA," or "Federal Land Credit Association." See "Policy Statement Concerning Official Names of Farm Credit System Institutions," 59 Fed. Reg. 66,537 (1994); see also 53 Fed. Reg. 50,387-50,388 (1988).

2202a therefore provides no basis for petitioners' claims against either Century Bank or the FmHA.[4]

b. A separate restructuring obligation is created by other provisions of the Agricultural Credit Act—provisions that amended the Consolidated Farm and Rural Development Act, under which the FmHA administers its farm loan program. Those provisions, however, are also inapplicable to the present case. The Act directs the Secretary of Agriculture to "modify delinquent farmer program loans made or insured [by the FmHA] or purchased from the lender." 7 U.S.C. 2001(a). "[F]armer program loans" are identified in 7 U.S.C. 1991(a)(10), and a "borrower" eligible for restructuring under Section 2001 is "any farm borrower who has *outstanding obligations to the Secretary* under any farmer program loan." 7 U.S.C. 1991(b)(1) (emphasis added). See 7 C.F.R. 1980.106(b)

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[4] The loan that petitioners obtained from the Farm Credit Bank was subject to restructuring under Section 2202a(b)(3) upon their request. There is no indication, however, that petitioners applied to the Farm Credit Bank for restructuring, nor is the Farm Credit Bank a party to the instant action. The statute does not, in any event, afford a private right of action for breach of Section 2202a(b)(3)'s requirements, see page 4, *supra*, and the FmHA had no involvement in the Farm Credit Bank's loan to petitioners. Petitioners rely (Pet. 4-6) on various state and federal court decisions holding that a borrower may raise as an equitable defense to a foreclosure action the bank's failure to comply with the requirements of the Agricultural Credit Act. Those decisions are inapposite here. Whatever defenses petitioners might have raised in the earlier foreclosure action filed by Farm Credit Bank, the present case does not involve the propriety of that foreclosure. Petitioners seek instead to use the Act as the basis for suit against a bank that is not subject to Section 2202a(b)(3)'s requirements, based on that bank's exercise of its right of redemption under a second deed of trust.

(definition of "borrower" under FmHA regulations), 1980.124 (loan restructuring provisions apply to FmHA "borrowers").[5]

A debtor on an FmHA-guaranteed loan is not a "borrower" of the FmHA for purposes of restructuring under 7 U.S.C. 2001. *First Nat'l Bank* v. *Pearson*, 455 N.W.2d 858, 861 (S.D. 1990). Such loans are made by private lending institutions, with the FmHA's guaranty that it will cover up to 90% of the *private lender's loss* after a foreclosure. *Ibid.* See 7 C.F.R. 1980.6(a) ("guaranteed loan" is "made and serviced by a lender"). Cf. *Parker* v. *Department of Agric.*, 879 F.2d 1362, 1364-1365 (6th Cir. 1989) (in FmHA-guaranteed loan, borrower has contractual relationship with private lender, not with FmHA).

By petitioners' own description, their Century Bank loans were "guaranteed" by the FmHA. Pet. 2; see 7 C.F.R. 1980.6(a). Accordingly, petitioners were not FmHA "borrowers," and they had no right under 7 U.S.C. 2001 to restructure those loans. See 54 Fed. Reg. 1534, 1535 (1989) (in a guaranteed loan, "[t]he borrower is still a borrower of the lender unless the lender assigns its portion of the loan to FmHA, and only then would the borrower be entitled to FmHA's insured servicing options"). Petitioners therefore failed to state a claim upon which relief could have been granted, and their complaint was properly dismissed.

2. Petitioners' argument that the district court and court of appeals should have transferred their

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[5] For examples of cases in which FmHA borrowers sought to restructure their loans, see *Kinion* v. *United States*, 8 F.3d 639 (8th Cir. 1993); *Lee* v. *Yeutter*, 917 F.2d 1104 (8th Cir. 1990); *United States* v. *Selenske*, 882 F.2d 220 (7th Cir. 1989).

action to the Court of Federal Claims similarly does not warrant this Court's review. Under 28 U.S.C. 1631, a court can transfer a case over which it lacks jurisdiction to a court where the action might have been filed, if the court finds that the transfer "is in the interest of justice." Because neither the FmHA nor Century Bank was subject to any legal obligation to restructure the loans at issue here, there is no basis for petitioners' suggestion that "the interest of justice" would have warranted (let alone required) the lower courts' exercise of discretion to transfer this case to any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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